Supreme Court, U.S.
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No. 98 1794

In The

Supreme Court of the United States

October Term, 1998

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 351,

Petitioner,

vs.

COOPER NATURAL RESOURCES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. In a case involving judicial review of a labor arbitration award, is the arbitrator's award sufficient summary judgment evidence of the facts found therein, or is a party required to introduce extrinsic evidence in support of the arbitrator's fact findings?

II. An employee was offered the choice by his employer of signing onto a Last Chance Agreement (LCA) or being fired. The arbitrator apparently regarded the employer's requirement that the employee submit to the LCA as a form of discipline subject to the grievance procedures. The court of appeals held that by submitting to the LCA the employee (and the union) waived all rights to grieve, even though the LCA contained no waiver agreement or admonitions. Is an express agreement or admonition regarding waiver required before an employee will lose his contractual right to appeal through the grievance procedure by signing an LCA?

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The opinion of the United States Court of Appeals for the Fifth Circuit, set forth in the Appendix at 1-12, is reported as *International Union of Operating Engineers, Local 351 v. Cooper Natural Resources, Inc.*, 163 F.3d 916 (5th Cir. 1999). The Memorandum Opinion and Order of the District Court, set forth in the Appendix at 13-21, was not reported. The Opinion and Award of the Arbitrator is set forth in the Appendix at 25-36.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254. The United States Court of Appeals for the Fifth Circuit issued its Opinion in this case on January 11, 1999. Panel Rehearing was timely requested. Rehearing was denied on February 9, 1999. (App. 40) This Petition was timely filed within 90 days of the panel rehearing denial, and is timely.

STATEMENT OF THE CASE

Cooper Natural Resources, Inc. (Cooper), filed this action in the United States District Court for the Northern District of Texas, Fort Worth Division, seeking to vacate an arbitration award pursuant to § 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185. The district court had federal question jurisdiction under 28 U.S.C. § 1331.

The issue in this case is whether a labor arbitrator exceeded his authority under a Collective Bargaining Agreement ("CBA"). The issue in the underlying arbitration proceeding was whether Cooper had just cause to discipline Elvin Gates ("Gates"), a Cooper employee and International Union of Operating Engineers ("Union") member, for an unknowing violation of Cooper's Alcohol and Drug Policy ("A&D Policy").[1]

A. Gates' wife gave him her prescription medication without his knowledge.

Gates had worked for Cooper for 15 years when he took his 1996 physical examination. As a part of the physical, Gates was required to submit to a drug test. Much to Gates' surprise, he tested positive for barbiturates. Gates denied taking any drug, but subsequently learned that his wife had, unbeknownst to him, substituted one of her prescription pain pills for the over-the-counter medications that he had been taking for severe headaches. (App. 26-27, 34)

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[1] The A&D Policy was incorporated into a CBA negotiated between the Union and Ozark-Mahoning Company, a subsidiary of Elf Atochem North America, Inc. Cooper purchased the assets of Ozark-Mahoning in December 1996. Consequently, the CBA refers to Ozark-Mahoning as the employer, and the A&D Policy is the Elf Atochem North America, Inc. Alcohol and Drug Policy. There is no dispute that the CBA and A&D Policy remained in effect after the sale. References in this petition to "Cooper" include Ozark-Mahoning and Elf Atochem before Cooper acquired Ozark-Mahoning's assets.

B. Cooper said 'sign the LCA or be fired.'

As a result of the positive drug test, Cooper initially decided to fire Gates. Following Union intervention, and in light of the fact that a clinical assessment showed that Gates had no appearance of addiction and no rehabilitation was warranted, Cooper suspended Gates for two weeks, required him to sign a "Last Chance Letter," and required him to go to an Assessment Center to be tested for addiction to drugs. The Last Chance Letter required Gates to be randomly tested for "at least 12 months," and subjected him to immediate discharge if he ever tested positive in any future drug screen. (App. 27-28)

Gates did everything he agreed to do under the Last Chance Letter, and, at the time the arbitration hearing was held, Gates had been randomly tested approximately 7 times during the 12 months preceding the hearing,[2] and had tested negative on all such tests. (App. 28)

C. Disputes regarding the A&D Policy are subject to arbitration.

The terms of Gates' employment with Cooper are governed by the CBA, including the A&D Policy, which is incorporated by reference by Article 29 of the CBA. Under Articles 21 and 22 of the CBA, disputes concerning the application and interpretation of the CBA are subject to the grievance and arbitration procedures.[3] Pursuant to

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[2] The Last Chance Letter was dated April 26, 1996, the Arbitrator issued the award on June 16, 1997.

[3] Article 29 § 2 of the CBA says that action taken by the Company resulting from alcohol and drug screening is not

Article 22 of the CBA, the sole function of the arbitrator is to determine whether the Company or the Union is correct with reference to the proper application and interpretation of the CBA, and the arbitrator's decision is final and binding upon both parties. (R. 35, 163, 183-84, 226-27)

The A&D Policy prohibits the use of alcohol or illegal drugs on company property, as well as off-duty use "which results in impaired work performance and attendance or erratic behavior in the workplace."[4] Under the A&D Policy, an "illegal drug" is any drug which has not been legally prescribed or is not being used for its intended purpose or as prescribed. The policy further provides that employees who test positive "shall be subject to discipline, including discharge, or other administrative action. " Pursuant to Article 27 of the CBA, any discipline imposed must be in accordance with the seriousness of the infraction, and such disciplinary action is expressly made subject to the grievance procedure. (R. 165, 176, 178)

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subject to the grievance and arbitration procedures, but the provision is in the context of a paragraph dealing with new hires, and is therefore inapplicable to Gates. (*See* App. 31-32)

[4] Gates was working the graveyard shift, and had been waking up at about 2:00 p.m. with severe headaches. He therefore would have taken the medication approximately 9 hours before his shift started at 11:00 p.m. Nothing in the record indicates that Gates was ever in any way impaired while on the job. (App. 27)

D. Gates complied with the LCA, but Gates and the Union appealed the requirement that he submit to the LCA.

Gates and the Union felt that the discipline imposed in the Last Chance Letter was too severe for an involuntary infraction, and filed a grievance pursuant to Articles 21 and 27 of the CBA. Cooper denied the grievance, and the dispute was submitted to arbitration. (App. 28-29)

E. The Arbitrator determined that Cooper assumed a duty to notify employees of the contents of the A&D Policy as a prerequisite to enforcement.

The Arbitrator heard the evidence and found for Gates and the Union. Arbitrator based his decision primarily on Cooper's failure to prove that it had complied with its obligation under the CBA to disseminate the A&D Policy. Paragraph XI of the A&D Policy provides:

> The Corporate Human Resources Department shall develop information and communications to ensure that employees are informed about the dangers of drug abuse in the workplace, and other legally-required information, including the employment consequences of an employee's refusal or failure to comply with the requirements of this Policy and the Drug-Free Workplace Act.

The Arbitrator interpreted this paragraph as an assumption of a duty on the part of Cooper to inform employees of the terms of the A&D policy. The Arbitrator therefore instructed Cooper's representatives that they had the burden to demonstrate that Gates had notice of the policy

and that, having such notice, he violated the policy. (App. 31-33)

F. The Arbitrator found that Cooper failed to demonstrate that it notified Gates of the terms of the A&D Policy.

Cooper initially argued that, because the A&D Policy was referenced in the CBA, it was incumbent upon Gates to seek out and learn the terms of the Policy. The Arbitrator rejected this approach based on Cooper's express assumption of the duty to inform employees of the terms of the Policy. Cooper therefore attempted to carry its burden by introducing two memoranda, one dated May 8, 1989, and the other dated May 20, 1992, which were addressed to all employees and which referenced an "enclosed" or "attached" Policy. However, the Policy was not attached to the memoranda that were introduced into evidence, and Cooper could not prove that Gates or any other employee actually received the memoranda. Cooper attempted by other means to show that Gates either read the policy or had it read to him, but Cooper had no witnesses who could testify (other than by hearsay) that Gates ever received a copy of the A&D Policy or that he ever had it read to him. The Union, on the other hand, contested the claim that Cooper ever distributed the A&D Policy, and Gates testified that he had never received a copy of the A&D Policy in the mail from anyone and that he had no knowledge of the Policy until after his drug screen. The Arbitrator resolved this factual dispute in favor of Gates and the Union. (App. 31-33)

G. The Arbitrator found no just cause to discipline Gates for an unknowing violation.

The Arbitrator also focused on the lack of proportionality in the punishment inflicted on Gates for an unknowing violation of an unknown policy. Article 27 of the CBA requires that any discipline imposed be in accordance with the seriousness of the infraction, and such disciplinary action is expressly made subject to the grievance procedure. The Arbitrator determined that Cooper discriminated against Gates by suspending him, by requiring the Last Chance Letter, and by requiring the Assessment. The Arbitrator determined that once Cooper learned the reason for the positive test and Gates had passed his Assessment requirement with the determination that no rehabilitation was necessary, Cooper lacked just cause to impose any form of discipline. Accordingly, the Arbitrator entered an award in favor of Gates and the Union, and ordered that all discipline imposed by Cooper against Gates be set aside. (App. 34-35)

H. Cooper sought judicial review of the Arbitrator's decision.

Cooper then filed this action against the Union seeking to vacate the arbitration award. The parties filed cross motions for summary judgment. The district court considered the motions together, and, on January 12, 1998, entered a Memorandum Opinion and Order denying the Union's motion, granting Cooper's motion, and setting aside the arbitration award. The Union appealed, and the court of appeals affirmed the opinion of the district court.

ARGUMENT

I. The Court should grant certiorari to determine whether a party is required to submit summary judgment evidence in support of unreviewable (and unchallenged) fact-findings of a labor arbitrator.

A. The standard of review is extremely deferential to the Arbitrator.

The standard of review applicable in an action to vacate an arbitration award is exceedingly deferential to the arbitrator. The courts have no authority to reconsider the merits of the award even though the parties may allege that the award rests on errors of fact or misinterpretation of the contract, and a court must affirm an award as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority. *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36-38, 108 S. Ct. 364, 369-71 (1987). A court may not disturb an arbitration award if it "draws its essence from the collective bargaining agreement" and is not based on the arbitrator's "own brand of industrial justice." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S. Ct. 1358, 1361 (1960). In other words, the court must affirm the arbitrator's decision if it is rationally inferable from the letter or purpose of the underlying agreement, regardless of whether the court agrees with the arbitrator's interpretation.

B. The court of appeals refused to respect the limits of the permissible scope of review.

While the court of appeals acknowledged the limited scope of review applicable in cases of this sort, it is clear from the opinion that it did not apply that standard as mandated by this Court's prior rulings. For example, sprinkled throughout the court of appeals' opinion and infecting every aspect of the court's reasoning, are criticisms of the factual basis for the Arbitrator's decision, and even slighting remarks directed at the Union for failing to support the Arbitrator's unreviewable findings with summary judgment evidence (specific instances are discussed throughout this Petition, particularly in the footnotes). The court of appeals simply ignored the fact that this Court has ruled that an arbitrator's findings are conclusively established and are not even subject to review. The law is clear that "Courts . . . do not sit to hear claims of factual or legal error by an arbitrator. . . . [A]n arbitrator must find facts and a court may not reject those findings simply because it disagrees with them." *Misco*, 484 U.S. at 38.

- In footnote 4, the Court says, "Although Gates contended at the arbitration, and the arbitrator so found, that he was unaware that his wife's medication contained barbiturates, the IUOE presented no summary judgment evidence in support of this contention." (App. 4 n.4) If, as this Court has ruled, the fact findings of the arbitrator are not even reviewable, how could the Union's failure to present summary judgment evidence in support of the arbitrator's unreviewable (and unchallenged) findings have any relevance whatsoever?

- The court of appeals repeated the error in Footnote 5, where it says "As with Gates assertion that he took barbiturates accidentally, the union did not seek to demonstrate via recourse to anything other than the bald assertion that Gates was unaware of Cooper Natural's drug policy." (App. 5 n.5)

- The court of appeals observed in footnote 5 that "the Union did not seek to demonstrate via recourse to anything other than the bald assertion that Gates was unaware of Cooper Natural's drug policy." (App. 11) The Union does not have to offer summary judgment evidence to support facts that have already been conclusively established, and the court's suggestion to the contrary merely demonstrates the court's lack of respect for the limits placed on its jurisdiction.

- The court of appeals states in its opinion that "there is no evidence countering Cooper Natural's claim that all parties had formally agreed, in the LCA, to a final resolution of their dispute." (App. 11) This is merely another example of the Court's refusal to apply the proper standard of review. The Arbitrator did not interpret the LCA as a final resolution, and there is no evidence to *support* Cooper's claim that all parties formally agreed to a final resolution of their dispute. Nothing in the LCA says that the parties intended or understood it to be final and unappealable. (*See* App. 37-39)

C. The court of appeals' opinion overturns this Court's decision in *Misco*.

The court of appeals' opinion exhibits a complete disregard for the standard of review applicable in cases of this type. The Fifth Circuit has now even gone so far as to introduce a rule requiring a party to introduce evidence

(in addition to the arbitration award) to support the arbitrator's fact findings. If allowed to stand, the Fifth Circuit's opinion in this case would eviscerate *Misco*. The parties bargained to have these issues determined by a labor arbitrator, not the district court or the court of appeals.

Although the Fifth Circuit's errors are obviously and unmistakably errors, and each of these errors was pointed out to the Fifth Circuit Panel in the Union's petition for rehearing, the court elected to stand by its opinion. This Court should grant certiorari to remind the Fifth Circuit that it is not enough to acknowledge the limits of its jurisdiction, it also has to respect them.

II. The Court should grant certiorari to determine whether, in the absence of any express agreement or admonition regarding waiver of arbitration rights, an employee and his union lose the right to appeal merely because the employee yields to the employer's requirement that the employee submit to the LCA.

A. The cases relied upon by the court of appeals do not deal with the issue presented here.

The court of appeals devoted section B of its opinion to a discussion of whether an LCA supersedes a CBA with respect to the employee who signed the LCA. The cases cited in the court of appeals' opinion in this section generally hold that an LCA supersedes a CBA in that an employee can be disciplined according to the terms of an LCA if he violates the terms of the LCA. *See, e.g., Coca Cola Bottling Co. v. Teamsters Local No. 688*, 959 F.2d 1438, 1440 (8th Cir.), *cert. denied*, 506 U.S. 1013 (1992) (holding

that arbitrator went outside last chance agreement by rejecting bargained for remedy of termination notwithstanding determination that rules violations, a triggering event under the agreement, had occurred); *Ohio Edison Co. v. Ohio Edison Joint Counsel*, 947 F.2d 786 (6th Cir. 1991) (district court enforced arbitration award holding that employee breached "last chance" agreement by continuing to use marijuana); *Tootsie Roll Indus., Inc. v. Local Union No. 1*, 832 F.2d 81, 82, 84 (7th Cir. 1987) (dispute non-arbitrable where employee breached "last chance" agreement in which he *expressly* waived right to pursue grievance); *Bakers Union Factory No. 326 v. ITT Continental Baking Co.*, 749 F.2d 350 (6th Cir. 1984) (holding that employee can be disciplined according to the terms of a last chance agreement if he violates the terms of the agreement). The issue in this case, however, is different. Gates did not violate a Last Chance Agreement and then ask an arbitrator to disregard the agreement. Gates was required to sign an LCA as a condition of continued employment, and he asked the Arbitrator to determine whether Cooper was justified in requiring him to do so.

B. No authority supports the Fifth Circuit's determination that submitting to an LCA carries an inherent waiver of contractual rights to appeal to arbitrator.

The issue here is whether an employer's requirement that an employee choose between submitting to an LCA or being fired can be a form of discipline subject to the grievance provisions of the CBA. Neither the court of appeals, the district court, nor Cooper cited any case even suggesting that an employer's actions in requiring an

employee to submit to an LCA cannot be a form of discipline subject to the grievance procedures of a CBA, nor is there any authority indicating that merely signing a last chance agreement waives the right to appeal the requirement that the agreement be signed.[5]

1. The authority underlying the cases relied upon by the Fifth Circuit conflict with the Fifth Circuit's opinion.

The cases relied upon by the Sixth Circuit in *Bakers Union Factory No. 326 v. ITT Continental Baking Co., Inc.*, 749 F.2d 350 (6th Cir. 1984) (the primary case relied upon by the Fifth Circuit in reaching its decision), conflict with the Fifth Circuit's reading of *Bakers Union*. The cases relied upon by the Sixth Circuit in reaching its *Bakers Union* decision demonstrate that the initial question of whether a settlement agreement is final and binding is a question for the arbitrator. For example, in one case relied upon in *Bakers Union*, the court said:

> Federal Courts are bound to exercise the utmost restraint to avoid intruding on the bargained-for method of dispute resolution when enforcement of an arbitration award or settlement agreement is sought . . . the court must be able to say "with positive assurance" that the award or settlement was intended to cover the dispute. If the court has any doubt, the parties should be returned to their grievance procedure and arbitration, for it

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[5] The LCA did not state that it was final and non-appealable, and it contained no agreement or admonition to the effect that Gates or the Union would waive the right to pursue a grievance by signing the LCA. (*See* App. 37-39)

> is an arbitrator, and not the court, who is to decide whether the same issue has already been resolved in an earlier proceeding."

United Mine Workers of America District No. 5 v. Consolidated Coal Co., 666 F.2d 806 (3rd Cir. 1981) (footnote omitted) (cited in *Bakers Union* at 355). In other words, it is up to the arbitrator to determine the intended effect of a settlement agreement. Another case relied upon by *Bakers Union* is even more to the point:

> In summary, plaintiff is entitled to have the arbitration board determine not only the substantive merits of the controversy over [the employee's] termination, *but also whether there was a waiver of arbitration or a breach of any settlement agreement.*

Office and Professional Employees International Union Local No. 9, AFL-CIO v. Allied Industrial Workers International Union, 397 F. Supp. 688 (E.D. Wis. 1975), *aff'd*, 535 F.2d 1257 (7th Cir. 1976) (emphasis added) (cited in *Bakers Union* at 355); *see also United Food & Commercial Workers Union, Local 1529, AFL-CIO-CLC v. Delta Catfish Processors, Inc.*, 767 F. Supp. 798 (N.D. Miss. 1991) (holding that issue of whether labor dispute between union and employer was settled was for arbitrator to decide).

2. Courts have not found an implied waiver in analogous situations.

In cases where federal appellate courts have addressed this issue in other contexts, the courts have rejected the idea of a waiver of the right to appeal. *See, e.g., Stewart v. United States Postal Office*, 926 F.2d 1146

(Fed. Cir. 1991) (employer cannot require employee to waive right to file EEOC charge in last chance agreement); *E.E.O.C. v. Cosmair Inc.*, 821 F.2d 1085 (5th Cir. 1987) (severance package that required the employee to agree to waive all rights to appeal his discharge (including bringing an age discrimination claim before the EEOC) held void as against public policy). While these cases are not directly on point in that they involve public policy issues inherent in discrimination claims, they at least indicate that there is no implied waiver of the right to appeal the employer's conduct in requiring that a last chance agreement be signed inherent in the mere act of signing the agreement. *Also cf. United States v. Portillo*, 18 F.3d 290 (5th Cir. 1994) (criminal defendant adequately informed that he waived right to appeal where defendant read and understood plea agreement containing waiver-of-appeal provision).

C. The Arbitrator should determine whether an LCA is a form of discipline subject to grievance procedures under the "common law of the shop."

Recognizing that it is up to the arbitrator to determine whether an LCA carries an implied waiver of the right to arbitrate is also indicated by this Court's admonition that a labor arbitrator is chosen to exercise "his knowledge of the common law of the shop." *United Steelworkers of America v. Warrior Gulf & Nav. Co.*, 363 U.S. 574, 581-82, 80 S. Ct. 1347, 1352-53 (1960). Whether requiring an employee to submit to an LCA is a form of employee discipline subject to the grievance procedure or whether it is intended to be a final, unappealable resolution of a

dispute is clearly within the special expertise of the Arbitrator, not of the court.

Nothing in the LCA released the parties from the arbitration process, explicitly or otherwise. (*See* App. 3739) The bottom line is that neither Gates nor the Union ever agreed that the LCA was a final, non-appealable resolution. The Arbitrator at least implicitly determined that "requiring" Gates to sign the LCA was a form of discipline, and, as such, that it was arbitrable under the terms of the CBA. (*See* App. 28) Whether the LCA was final and non-appealable, or whether it was just a form of employee discipline subject to the arbitration procedure, is a matter within the particular expertise of a labor arbitrator, not the district court or the court of appeals.

D. The Fifth Circuit's opinion is contrary to law.

The Fifth Circuit's determination that a LCA is final and unappealable as a matter of law is completely unsupported by any authority and is contrary to the principles set out by this Court and various federal courts in analogous situations. The Court should grant certiorari to resolve this conflict in principle.

III. There is no legitimate alternate ground for affirming the opinion of the court of appeals that might render moot this Court's resolution of the questions presented herein.

A. Alternate grounds for affirmance suggested in the Fifth Circuit's opinion are not legitimate.

In addition to its implicit holding that an LCA cannot be a form of discipline subject to the bargained for grievance

procedures, the court of appeals additionally held in Section A of its opinion that the Union would lose anyway because Gates had notice of the A&D Policy. This Court should not take this portion of the court of appeals' opinion as creating a legitimate alternate ground for affirmance that would render any decision on the LCA issue moot. The court of appeals' opinion disposed of this case without addressing any potentially controversial issues by ignoring every argument or issue stated in the Union's briefs.[6]

1. The court of appeals misstates the issue on "notice" of the A&D Policy.

For example, in section A of the opinion, the Court discusses whether "Gates had notice under the CBA that a drug policy circumscribed his actions," and concludes

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[6] The court of appeals' opinion even goes so far in overlooking the arguments in Appellant's briefs as to affirmatively state that the LCA waiver issue was not even raised. Specifically, in determining that Gates could not challenge the LCA, the court states "each of the union's arguments before this court addresses the propriety of Gates' discipline, not the binding nature of the LCA" (App. 11-12). This is simply not true. On pages 33-36 of the Union's initial brief (under the heading "The District Court Erred in Reading a Nonexistent Waiver of the Right to Appeal into the Last Chance Letter") and pages 6-9 of its reply brief (under the heading "Gates did not waive his right to arbitrate by signing the Last Chance Letter"), the Union specifically addressed the binding nature of the LCA (including a discussion of every case cited in the relevant section of the court's opinion and why they do not support the court's conclusions).

that he did. The Court could not have reached that conclusion if it had addressed the issue presented in Appellant's briefs and applied the proper standard of review.

2. The court of appeals improperly focused on whether Cooper notified Gates of the existence of the policy, not its terms.

It is genuinely indisputable that Gates did not have actual notice of the contents[7] of the A&D Policy. That fact is established by the Arbitrator's findings, and the court of appeals lacked jurisdiction to second-guess that factual determination.[8] *Misco*, 484 U.S. at 38 ("Courts . . . do not

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[7] The court of appeals also improperly focuses on whether Gates had notice of the mere existence of an A&D Policy rather than on whether Gates had notice of the terms of the A&D Policy. (App. 7-8) This misrepresents the Arbitrator's Award and the issues raised in Union's briefs. The Arbitrator ruled that Cooper had contractually assumed the duty to notify employees of the terms – not the mere existence – of the A&D Policy as a prerequisite to enforcement. (App. 31-32) It is irrelevant under the Arbitrator's reasoning whether Gates knew that an A&D Policy existed; in order to enforce the policy, Cooper first had to notify Gates of its terms (*i.e.*, exactly what conduct is prohibited, consequences of a violation, etc.). Cooper could have had an A&D Policy that did not cover the conduct Gates was charged with (*e.g.*, the policy could have only covered intoxication on the job, or only covered abuse of street drugs, or expressly excluded unknowing conduct), and it could have had a policy that would not allow the discipline Cooper sought to impose (*e.g.*, the policy could have only called for counseling for a first violation).

[8] When the court of appeals says that it is "loathe to accept the arbitrator's reasoning" (App. 8) supporting his finding that Gates lacked notice of the A&D Policy, the court of appeals is

sit to hear claims of factual or legal error by an arbitrator. . . . [A]n arbitrator must find facts and a court may not reject those findings simply because it disagrees with them."). On the other hand, the Union never disputed that Gates had constructive notice of the existence of the policy because it was incorporated into the CBA.

3. The real issue is whether Cooper is somehow barred from contractually assuming the duty to notify employees of the terms of the policy as a prerequisite to enforcement.

The issue presented by the Arbitrator's Award, and dodged by the court of appeals, is whether the fact that Gates is deemed to have constructive notice of the A&D Policy means that Cooper, as a matter of law, could not have assumed the responsibility to provide employees with actual notice of the terms of the A&D Policy as a prerequisite to imposing discipline under that policy. The only question the court of appeals was authorized to address on this issue was whether the CBA can be read as including a bargained for condition precedent to the enforcement of the A&D Policy.[9] Whether that is the

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really saying that it is loathe to accept the limits placed on its jurisdiction.

[9] The Arbitrator's ruling that Cooper assumed the duty to inform employees of the terms of the A&D Policy incorporated into the CBA is derived directly from ¶ XI B of the CBA:

> The Corporate Human Resources Department shall develop information and communications to *ensure* that employees are informed about the dangers of drug abuse in the workplace, and other legally-required information, *including the employment*

correct reading, and whether the Arbitrator was correct in finding that the condition precedent had not been fulfilled are beyond the scope of permissible review. *Misco*, 484 U.S. at 36 ("The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract.")

B. The court of appeals ignored alternate grounds for affirming the Arbitrator based on his "no just cause" determination.

The court of appeals similarly side-stepped the fact that the Arbitrator's Award can be fairly read as holding that Cooper lacked just cause to discipline Gates because he did not knowingly violate the A&D Policy. (*See* App. 35) The Arbitrator's finding that Gates did not know that his wife had given him her prescription pain medication rather than an over-the-counter medication is binding on the courts and not subject to review. *Misco*, 484 U.S. at 38. The only issue the Court was permitted to consider was whether the Arbitrator lacked the authority under the CBA to review whether Cooper had just cause to

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consequences of an employee's refusal to comply with the requirements of this Policy and the Drug-Free Workplace Act.

(emphasis added) The Arbitrator interpreted ¶ XI B of the Alcohol and Drug Policy as placing the burden on the employer to educate its employees on the terms of the policy. (*See* App. 31-32)

discipline Gates.[10] The court of appeals avoided this issue by stating in a footnote that there was no evidence to

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[10] Under Article 27 of the CBA, employee discipline must be imposed in accordance with the seriousness of the offense, and disciplinary action is expressly made subject to the grievance procedure. Under the terms of the CBA, the proportionality of the penalty is clearly and unequivocally an arbitrable issue. (R. 166) The Arbitrator therefore could not have exceeded his authority in ruling on the appropriateness of the penalties imposed by Cooper.

The court's statement in footnote 2 that "The CBA . . . provided that any action taken by Cooper Natural resulting from a drug screen would not be subject to the grievance procedures set forth in the CBA" (App. 3) is simply wrong and is yet another instance of the Court's refusal to abide by the standard of review applicable to this case. The relevant portion of the CBA reads:

> *New hires* will be subject to Alcohol and Drug Screening at management's discretion for up to six (6) months from their date of hire. Any action taken by the Company which results from Alcohol and Drug Screening will not be subject to grievance or rehabilitation procedures.

(R. 166) (emphasis added) On its face, this paragraph applies only to new hires. Moreover, it is established law that a dispute should be arbitrated "unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986), *quoting United Steelworkers of America v. Warrior Gulf Nav. Co.*, 363 U.S. 574, 582-83 (1960). The drug screening exclusion of the CBA can plausibly be interpreted as applying only to new hires, and that is all that is required to render Gates' dispute arbitrable. The court could not apply the correct standard of review and still say, as it did, that the CBA exempts Cooper's actions from the grievance procedures. However, even if the court's reading of the CBA were supportable, however, it

support the Arbitrator's unchallenged finding that Gates' did not know he was taking his wife's prescription medication.

CONCLUSION

The Court should grant *certiorari* to review the Fifth Circuit's requirement that a party introduce summary judgment evidence to support the fact findings of a labor arbitrator, which are not even reviewable under *Misco, Inc.*, 484 U.S. 29 (1987).

The Court should also grant *certiorari* to determine whether an employer's requirement that an employee submit to a Last Chance Agreement can be subject to contractual grievance procedures where there is no agreement to waive the right to arbitrate and no admonition that signing the agreement would waive any such rights.

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would make no difference. Once the question was submitted to arbitration, any objections to arbitrability were waived. *Executone Information Systems, Inc. v. Davis*, 26 F.3d 1314, 1323 (5th Cir. 1994).

Petitioner therefore requests that the Court grant *certiorari*, reverse the Fifth Circuit, direct entry of judgment in favor of the Union.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-10273
(Summary Calendar)

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 351,

Defendant-Appellant.

versus

COOPER NATURAL RESOURCES, INC.,

Plaintiff-Appellee.

Appeal from United States District Court
for the Northern District of Texas

(Filed Jan. 11, 1999)

Before KING, BARKSDALE and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

The International Union of Operating Engineers ("IUOE" or the "union"), through its Local 351, defendant in a lawsuit brought pursuant to the Labor Management Relations Act of 1947, 29 U.S.C. §§ 185(a), (c) (1994) ("LMRA"), appeals an order of the district court vacating an arbitration award in its favor. Cooper Natural Resources, Inc. ("Cooper Natural") brought suit under the LMRA after a dispute between it and the IUOE had been submitted to arbitration; since the arbitration involved the construction of a contract between an

employer and a labor organization, the district court was authorized to evaluate the arbitrator's decision. Pursuant to that review, the District Court for the Northern District of Texas found that the arbitration, which concerned a disciplinary action against an employee union member, was deficient in several respects. As such, the district court granted summary judgment in favor of Cooper Natural and vacated the award. We conclude that the award should indeed be vacated and thus AFFIRM the district court in all respects.

I. FACTS AND PROCEDURAL HISTORY

Cooper Natural produces sodium sulphate, a mineral commonly used in detergents and in the manufacture of wood pulp, at a facility in Seagraves, Texas. The manufacture of sodium sulphate is an inherently dangerous industry; thus, Cooper Natural has an extensive safety policy for its employees. Cooper Natural trains its employees thoroughly in the proper conduct of their duties to ensure that accidents do not occur. Since 1971, Cooper Natural's employees have been represented by the IUOE. In 1993, Cooper Natural and the IUOE negotiated a new collective bargaining agreement ("CBA") to replace one which had been in place for some years;[1] this

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[1] In December 1996, Cooper Natural purchased the assets of Ozark-Mahoning Company ("Ozark-Mahoning"), a subsidiary of Elf Atochem North America, Inc. The CBA and the alcohol and drug policy at issue in this lawsuit were negotiated by Ozark-Mahoning, but it remained in effect after the sale to Cooper Natural. Thus, for convenience's sake, references in this opinion will be to Cooper Natural throughout.

1993 CBA incorporated by reference an alcohol and drug policy to which the parties had agreed in 1992. The IUOE's members ratified the 1993 CBA; pursuant to the CBA, the employees agreed, *inter alia*, to submit to periodic, random drug tests.

These drug screening tests took place during physical examinations of employees; if the test disclosed that an employee's use of controlled substances might be detrimental to the employee or to fellow employees at the plant, Cooper Natural reserved the right under the CBA "to make such adjustments in the employee's status as are found necessary to correct the situation."[2] At one such random screening, conducted during an annual physical, Elvin Gates, a member of Local 351, tested positive for barbiturates.[3] At the time of this physical in 1996, Gates occupied the job of chiller operator at the Seagraves plant, and his duties included the operation of a mechanical refrigeration system charged with anhydrous ammonia. Anhydrous ammonia, a hazardous substance regulated by the Occupational Health & Safety Administration, could seriously harm the operator of the refrigeration system as well as others around the system if the ammonia is handled improperly. Gates explained his positive test as resulting from his severe headaches,

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[2] The CBA also provided that any action taken by Cooper Natural resulting from a drug screen would not be subject to the grievance procedures set forth in the CBA.

[3] Gates was informed at the outset of his physical that the examination would include a drug screening; before the physical ever began, Gates signed a consent form authorizing collection of a urine specimen for purposes of the screen.

which led to his taking his wife's prescription medication containing barbiturates to relieve them.[4]

As a result of the positive test, Cooper Natural decided to discharge Gates. After notification that he was to be released, the IUOE intervened on Gates's behalf, and the union and Cooper Natural negotiated a Last Chance Agreement (the "agreement" or "LCA") whereby Gates's discipline would be reduced. Pursuant to this agreement, Gates was allowed to continue his employment as a chiller operator, but with loss of pay for the time he was off work (a few weeks) during the dispute. In exchange for this "last chance," Gates agreed (1) to abstain from using drugs in derogation of the drug policy; (2) to submit to whatever testing was deemed necessary by Cooper Natural for a period of no less than twelve months; and (3) that his failure to comply with either promise would subject him to immediate termination.

Almost immediately after execution of the agreement, Gates and the IUOE filed a grievance requesting

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[4] Although Gates contended at the arbitration, and the arbitrator so found, that he was unaware that his wife's medication contained barbiturates, the IUOE presented no summary judgment evidence in support of this contention.

In its briefs before this court, the IUOE again simply asserts that Gates was unaware that he was taking barbiturates when he medicated himself using his wife's physician-prescribed controlled substances. Cooper Natural would have us affirm the district court on the ground that the IUOE cannot introduce on appeal evidence which it did not tender at summary judgment, but we do not consider the IUOE's unsupported assertion that Gates failed to realize what he was doing to be "new evidence." As nothing more than an argumentative conclusion, we decline to affirm on that ground.

that the LCA be set aside. Cooper Natural denied the grievance, and the union thereafter submitted the matter to arbitration. Under the CBA, the arbitrator's sole function was to determine whether Cooper Natural or the union was correct with reference to the proper application and interpretation of the CBA. The arbitrator did not have any authority to change, modify, amend, or supplement the CBA.

At the arbitration, the union conceded that Gates had taken barbiturates and tested positive on the random drug screen. The IUOE nevertheless argued that Gates should not have been disciplined at all because he lacked notice of the drug policy.[5] In response, Cooper Natural introduced into evidence two memoranda that reflected that it had given copies of its drug policy to all employees when the 1992 policy was enacted and incorporated into the CBA.[6] Notwithstanding this evidence, the arbitrator held that, because the drug policy was not physically attached to the memoranda introduced into evidence, Cooper Natural failed to show that Gates had notice of the policy. As a result, the arbitrator sustained the grievance and ordered that the LCA be set aside and that Gates be made whole in all respects.

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[5] As with Gates's assertion that he took the barbiturates accidentally, the union did not seek to demonstrate via recourse to anything other than the bald assertion that Gates was unaware of Cooper Natural's drug policy.

[6] Gates had been employed at the plant since January 1982, rising to the level of chiller operator sometime before 1996. At all times, Gates was represented by the union, and he ratified the 1993 CBA.

The district court acknowledged at the outset of its review that its ability to overturn an arbitrator's award was limited; as long as the arbitrator's award "draws its essence from the CBA" and is not merely the arbitrator's "own brand of industrial justice," the district court conceded, the award must be affirmed. *See* Memorandum Opinion of District Court at 6 (quoting *United Paperworkers' Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987)). The court held that this award, however, was deficient because it was contrary to express contractual provisions. The district court ruled that whether Gates had notice of the drug policy was not an interpretation issue for the arbitrator to determine and that the arbitrator "usurped the ability of the parties to settle their own dispute" by implementing a remedy that was unsupported by the LCA. Mem. Op. at 7. Consequently, the district court vacated the arbitrator's decision to set aside the LCA and granted summary judgment in favor of Cooper Natural.

II. DISCUSSION

We exercise *de novo* review of the grant of a summary judgment. *See Boyd v. State Farm Ins. Cos.*, 158 F.3d 326, 328 (5th Cir.1998). Summary judgment shall be entered in favor of the moving party if the record, taken as a whole, "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

A. Gates had notice under the CBA that a drug policy circumscribed his actions.

Review of arbitration awards is, of course, strictly limited. *See Delta Queen Steamboat Co. v. District 2, Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 604 (5th Cir. 1989), *cert. denied*, 498 U.S. 853 (1990); *see also United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (finding that an arbitration award "is legitimate only so long as it draws its essence from the collective bargaining agreement"). Nonetheless, we conclude that the district court's review was appropriate as to the question whether Gates had notice of the drug policy; the arbitrator's finding to the contrary ignored the plain language of the contract and involved his engaging in just the sort of "industrial justice" that the Supreme Court has proscribed. *See Misco*, 484 U.S. at 36, *see also Delta Queen*, 889 F.2d at 604 ("[T]he rule in this circuit . . . is that arbitral action contrary to express contractual provisions will not be respected.").

In the case at bar, the IUOE does not dispute that Gates ratified the 1993 CBA. Consequently, there can be no genuine issue of material fact as to whether the drug policy, which was explicitly incorporated into the CBA, bound Gates and all other employees at the plant. The arbitrator's protracted discussion concerning whether Gates had notice of the drug policy was not an issue open to interpretation under the CBA. To hold, as the arbitrator did, that Gates had no notice of the policy, leads to the unwarranted conclusion that Gates had no notice of an agreement, the 1993 CBA, that he ratified, presumably after reading it. As the district court also found, the

arbitrator simply did not have the authority to ignore the parties' agreement in fashioning a remedy, *see S.D. Warren Co. v. United Paper Workers' Int'l Union*, 845 F.2d 3, 8 (1st Cir.), *cert. denied*, 488 U.S. 992 (1988), because an award that is contrary to express contractual provisions cannot be sustained. *See Bruce Hardwood Floors v. UBC, Southern Council of Indus. Workers, Local 2713*, 103 F.3d 449, 452 (5th Cir.), *cert. denied*, ___ U.S. ___, 118 S.Ct. 329 (1997).

In addition, even if we were somehow to conclude that ratifying the 1993 CBA, which incorporated the 1992 drug policy, did not constitute notice to Gates, we are loathe to accept the arbitrator's reasoning. It defies credulity to conclude that Gates did not have notice because the memorandum adduced as evidence by Cooper Natural – a memorandum whose sole purpose was to discuss the alcohol and drug policy – failed to attach a copy of the drug policy. Furthermore, Gates consented to have his urine sampled at his annual physical after being informed that the sample was to be used in a random drug screen. This action constituted effective notice to Gates that a drug policy existed.

B. The Last Chance Agreement superseded the CBA with respect to Gates.

The second consideration which leads us to set aside the arbitrator's award is actually one of more import for this circuit. When Cooper Natural and the union entered into the LCA, reducing Gates's punishment for failing the drug test, the parties formed a binding contract pursuant to the CBA which was entitled to enforcement by the

arbitrator as "the parties' chosen means of dispute resolution." *Bakers Union Factory No. 326 v. ITT Continental Baking Co., Inc.*, 749 F.2d 350, 354 (6th Cir. 1984). The LCA must be thought of as a supplement to the CBA and is just as binding upon the arbitrator. This has been the rule in three of our sister circuits, and we adopt it today as the governing law for this court. *Cf. Coca-Cola Bottling Co. v. Teamsters Local No. 688*, 959 F.2d 1438, 1440 (8th Cir.), *cert. denied*, 506 U.S. 1013 (1992); *Ohio Edison Co. v. Ohio Edison Joint Council*, 947 F.2d 786, 787 (6th Cir. 1991); *Tootsie Roll Indus., Inc. v. Local Union No. 1*, 832 F.2d 81, 84 (7th Cir. 1987).

According to the reasoning we herein adopt, an arbitrator ignoring the explicit terms of a last chance agreement is owed no deference, and his award must be closely scrutinized. This seemingly harsh rule is necessary because last chance agreements constitute formal contractual settlements of labor disputes. *See Bakers Union Factory*, 749 F.2d at 356. Since LCAs follow collective bargaining agreements in time, they should be construed as superseding a CBA in certain circumstances because an LCA reflects the parties' own construction of the CBA.

As observed *supra*, our sister circuits have long enforced this principle and have vacated arbitral awards that disregard last chance agreements. The decisions establishing this principle merit some closer scrutiny. In *Tootsie Roll Industries*, the Seventh Circuit considered the case of an employee who had been initially discharged for excessive absenteeism; thereafter, however, the employer and the union executed a last chance agreement, and the employee was subjected to reduced discipline. *See Tootsie Roll Industries*, 832 F.2d at 82. In

exchange for being reinstated with back pay, the employee agreed that she would not miss any further days "for any reason whatsoever." *See id.* After missing another day, the employee was discharged, and she and the union went to arbitration. At arbitration, the arbitrator considered only the employer's liberal shop policy, which did not count excused absences, and reinstated the employee. *See id.* at 83. The district court vacated the award, and the Seventh Circuit affirmed on the ground that the arbitrator had no authority to modify the LCA, but rather was bound to enforce it as written. By not basing his award in "the essence of the agreement," the arbitrator neglected his duty to follow the "clear requirements" of the parties' negotiated contracts. *Id.* Under these circumstances, the arbitration award effectively eliminated the purpose of the LCA, which was to subject the employee to a higher standard than her peers. The court observed that, had the parties intended the regular policy to apply, there would have been no reason to spell out more specific attendance requirements in the LCA. *See id.*

Similarly, in *Coca-Cola Bottling*, the union and the employer agreed to a last chance agreement to save an employee union member from discharge due to poor performance. *See Coca-Cola Bottling*, 959 F.2d at 1439. The LCA provided that the employee would be suspended and that any future similar offenses would result in discharge. Upon his reinstatement, the employee committed such an offense and was discharged. At arbitration, the arbitrator found that the employee had committed the

offense at issue, but determined that the collective bargaining agreement did not permit the employer to discharge the employee. *See id.* at 1440-41. The district court vacated the award, and the Eighth Circuit affirmed, finding that the LCA "superseded the collective bargaining agreement." *Id.* at 1440. As such, the arbitrator was required to view the express provisions of the LCA as representing the parties' actual intentions with respect to this employee.

Finally, in *Ohio Edison*, the Sixth Circuit reaffirmed its holding in *Bakers Union* by ruling that an arbitrator does not have the authority to disregard the explicit terms of a prior settlement or last chance agreement. *See Ohio Edison*, 947 F.2d at 787. In *Ohio Edison*, an employee with a drug abuse problem was given a last chance to desist from using drugs or face termination. After continuing to use drugs, the employee was terminated. At arbitration, the employee was reinstated because the arbitrator found the LCA to be "unreasonably harsh." *Id.* The district court enforced the arbitration award, but the Sixth Circuit reversed and remanded, holding that "normally last chance agreements are binding in arbitration," and observing that here the arbitrator did not have the authority to set aside the LCA, even if it were harsh. *Id.*

In the case at bar, the arbitrator similarly disregarded his obligation to enforce the LCA. After Gates's dismissal, the union interceded and negotiated a last chance agreement which placed Gates back on the job; there is no evidence countering Cooper Natural's claim that all parties had formally agreed, in the LCA, to a final resolution of their dispute. Indeed, each of the union's arguments

before this court addresses the propriety of Gates's discipline, not the binding nature of the LCA. By ignoring the LCA and substituting his own impressions in the arbitration, the arbitrator fundamentally ignored his responsibility to construe the parties' agreements in an evenhanded way.

III. CONCLUSION

For these reasons, we establish today that a last chance agreement will in most cases supersede the terms of a collective bargaining agreement, and should be viewed as such by an arbitrator. As the arbitrator in this case failed to do so, we hold that the district court properly vacated the arbitration award, and we thus AFFIRM the order of the district court in all respects.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

COOPER NATURAL RESOURCES, INC., Plaintiff,	§	NO. 4:97-CV-669-A
VS.	§	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 351, Defendant.	§	

MEMORANDUM OPINION
and
ORDER

(Filed Jan. 12, 1998)

Came on for consideration the cross-motions of plaintiff, Cooper Natural Resources, Inc., and defendant, International Union of Operating Engineers, Local 351, for summary judgment. The court, having considered the motions, plaintiff's response to defendant's motion, the record, the summary judgment evidence, and applicable authorities, finds that plaintiff's motion should be granted and that defendant's motion should be denied.[1]

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[1] Defendant has failed to respond to plaintiff's motion for summary judgment, which was filed December 4, 1997. Pursuant to Rule 7.1(e) of the Local Civil Rules of the United States District Court for the Northern District of Texas, defendant's response was due to be filed within 20 days from the filing of the motion for summary judgment.

I.

History

On August 11, 1997, plaintiff filed its original complaint, and on August 12, its amended complaint, to vacate arbitration award. Plaintiff asks the court to set aside an award issued June 16, 1997, by arbitrator Barnett M. Goodstein (the "Arbitrator" with regard to a grievance on behalf of Elvin Gates ("Gates"). Plaintiff maintains that the Arbitrator exceeded his authority, ignored the contracts governing the relationships between the parties, violated public policy, and ruled on a matter that was not arbitrable in the first instance.

Each party alleges that it is entitled to summary judgment. Plaintiff contends that the Arbitrator's award should be set aside; defendant contends that the award should be upheld.

II.

Applicable Summary Judgment Principles

A party is entitled to summary judgment on all or any part of a claim as to which there is no genuine issue of material fact and as to which the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party has the initial burden of showing that there is no genuine issue of material fact. *Anderson*, 477 U.S. at 256. The movant may discharge this burden by pointing out the absence of evidence to support one or more essential elements of the non-moving

party's claim "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986). Once the moving party has carried its burden under Rule 56(c), the non-moving party must do more than merely show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The party opposing the motion may not rest on mere allegations or denials of pleading, but must set forth specific facts showing a genuine issue for trial. *Anderson*, 477 U.S. at 248, 256. To meet this burden, the nonmovant must "identify specific evidence in the record and articulate the 'precise manner' in which that evidence support[s] [its] claim[s]." *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir.), *cert. denied*, 513 U.S. 871 (1994). An issue is material only if its resolution could affect the outcome of the action. *Anderson*, 477 U.S. at 248. Unsupported allegations, conclusory in nature, are insufficient to defeat a proper motion for summary judgment. *Simmons v. Lyons*, 746 F.2d 265, 269 (5th Cir. 1984).

The standard for granting a summary judgment is the same as the standard for a directed verdict. *Celotex Corp.*, 477 U.S. at 323. If the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Matsushita*, 475 U.S. at 597.

III.

Undisputed Facts[2]

The facts established by the summary judgment evidence are:

Plaintiff produces sodium sulphate at a facility in Seagraves, Texas. Sodium sulphate is a mineral commonly used in detergents and in the manufacture of wood pulp. Because the facility is a dangerous industrial environment, safety is a major concern. Plaintiff has an extensive safety policy and its employees are trained extensively in safety issues. Since 1971, plaintiff's employees have been represented by defendant. The relationship between plaintiff and defendant is governed by a collective bargaining agreement (the "CBA"). The pertinent CBA was executed in 1993 and incorporates by reference an alcohol and drug policy to which the parties had agreed in 1992. Pursuant to that policy, plaintiff regularly tests its employees for the use of drugs. The CBA, which incorporates the drug policy by reference, was submitted by defendant to its members for ratification prior to its implementation. Defendant's members ratified the CBA.

Pursuant to the CBA, plaintiff had the right to test employees for the use of drugs. If a physical examination, including a drug screening test, disclosed that an employee's condition might be detrimental to the employee or others in the plant, plaintiff reserved the

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[2] Defendant has not come forward with any summary judgment evidence. Nor has it complied with any of the requirements of Local Civil Rule 56.1.

right "to make such adjustments in the employee's status as are found necessary to correct the situation." The CBA further provided that any action taken by plaintiff resulting from drug screening would not be subject to the grievance procedures set forth in the CBA.

Gates is a member of defendant. In 1996, he occupied the job of chiller operator at plaintiff's facility. That job encompassed the operation of a mechanical refrigeration system charged with anhydrous ammonia. Anhydrous ammonia is a hazardous substance regulated by the Occupational Safety & Health Administration. Incorrect operation of the refrigeration system could result in a release of anhydrous ammonia, thus exposing the operator and others to substantial harm. On April 9, 1996, Gates submitted to an annual physical, which included a drug screen. Gates's drug screen tested positive for barbiturates. Gates admitted having taken medication prescribed for his wife which contained barbiturates.[3]

Plaintiff decided to discharge Gates. However, after Gates and defendant's representatives met with plaintiff, all agreed to modify the discipline and did so by the execution of a last-chance agreement (the "agreement").

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[3] Defendant did not submit any summary judgment evidence to substantiate the contention in the "factual background" section of its motion, and the finding of the Arbitrator, that Gates did not know he was taking barbiturates. Nor is there any summary judgment evidence to support the contention, and Arbitrator's finding, that Gates had no knowledge of his employer's drug policy. Moreover, the finding of the Arbitrator had no relevance to the conclusion he reached, which led to his award.

Pursuant to the agreement, Gates was allowed to continue his employment but with a loss of pay for the time he was off work before his reinstatement. In return for this lesser discipline, Gates agreed to abstain from using any drugs in derogation of the drug policy, agreed to submit to whatever testing was deemed necessary by plaintiff for a period of no less than 12 months, and agreed that his failure to honor his promises would subject him to immediate termination.

Following execution of the agreement, on May 9, 1996, Gates and defendant filed a grievance requesting that the agreement be set aside. Plaintiff denied the grievance and the matter was submitted to arbitration by defendant. Under the CBA, the Arbitrator's sole function was to determine whether plaintiff or defendant was correct with reference to the proper application and interpretation of the CBA. The Arbitrator did not have any authority to change, amend, modify, or supplement the CBA.

At the arbitration proceeding, defendant conceded that Gates had taken barbiturates and tested positive on his drug screen. Defendant argued, however, that Gates should not be disciplined because he lacked notice of the drug policy. Plaintiff introduced two memos that reflected that it had given copies of its drug policy to all employees in both 1989 and 1992. The Arbitrator determined that plaintiff had not shown that Gates had notice of the policy. The Arbitrator sustained the grievance and ordered that the agreement be set aside and that Gates be made whole in all respects.

IV.

The Arbitrator's Award

Review of arbitration awards is normally limited. *Delta Queen Steamboat Co. v. District 2, Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 604 (5th Cir. 1989), *cert. denied*, 498 U.S. 853 (1990). As long as the arbitrator's award "draws its essence from the collective bargaining agreement," and is not merely "his own brand of industrial justice," the award is legitimate. *United Paper Workers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987); *Delta Queen*, 889 F.2d at 602. An award that is contrary to express contractual provisions will not be respected. *Bruce Hardwood Floors v. UBC, Southern Council of Indus. Workers, Local 2713*, 103 F.3d 449, 452 (5th Cir.), *cert. denied*, 118 S. Ct. 329 (1997); *Delta Queen*, 889 F.2d at 604. Here, the award must be set aside for at least two reasons.

First, whether Gates had notice of the drug policy was not an interpretation issue for the Arbitrator to determine. Rather, the Arbitrator was bound by the terms of the CBA, which incorporated the drug policy by reference. Defendant does not dispute that Gates ratified the CBA. Defendant's Original Answer, V. The Arbitrator's finding that Gates had no notice of the drug policy, which was incorporated into the CBA, leads to the absurd result that plaintiff and defendant engaged in a meaningless act in negotiating the CBA and drug policy. The Arbitrator simply did not have the authority to ignore the parties' agreement. *S.D. Warren Co. v. United Paper Workers Int'l Union*, 845 F.2d 3, 8 (1st Cir.), *cert. denied*, 488 U.S. 992 (1988).

A second reason that the Arbitrator's award must be set aside is that the Arbitrator usurped the ability of the parties to settle their own dispute by entering into the agreement. There had been a disagreement between the parties. Plaintiff wanted to terminate Gates; defendant insisted that termination was too harsh a punishment for his positive drug test. The parties compromised by entering into the agreement, which was entitled to enforcement as a binding contract. *See, e.g., Coca-Cola Bottling Co. v. Teamsters Local No. 688,* 959 F.2d 1438, 1440 (8th Cir.), *cert. denied,* 506 U.S. 1013 (1992); *Ohio Edison Co. v. Ohio Edison Joint Counsel,* 947 F.2d 786, 787 (6th Cir. 1991); *Tootsie Roll Indus., Inc. v. Local Union No. 1,* 832 F.2d 81, 84 (7th Cir. 1987). The Arbitrator had no authority to set aside the agreement. *Id.*[4]

V.

ORDER

For the reasons discussed herein,

The court ORDERS that plaintiff's motion for summary judgment be, and is hereby, granted; that defendant's motion for summary judgment be, and is hereby, denied; and that the June 16, 1997, opinion and award of the Arbitrator the subject of this action be, and is hereby, set aside and vacated.

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[4] There is no need to discuss the final two grounds raised by plaintiff – public policy and exclusion of drug screen discipline from the grievance procedure. The reasons discussed are sufficient to set aside the Arbitrator's opinion and award.

SIGNED January 12, 1998.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

CASE: 4:97-cv-00669
DOCUMENT: 17
DATE: 01/13/98

CLERK: mjw

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 98-10273
Summary Calendar

D.C. Docket No. 4:97-CV-669-A

COOPER NATURAL RESOURCES INC

Plaintiff-Appellee

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 351

Defendant-Appellant

Appeal from the United States District Court for the Northern District of Texas, Fort Worth.

Before KING, BARKSDALE, and STEWART, Circuit Judges.

JUDGMENT

(Filed Jan. 11 1999)

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: FEB 18 1999

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

COOPER NATURAL RESOURCES, INC.,	§	
Plaintiff,	§	NO. 4:97-CV-669-A
VS.	§	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 351,	§	
Defendant.	§	

FINAL JUDGMENT

(Filed Jan. 12, 1998)

In accordance with the court's memorandum opinion and order of even date herewith,

The court ORDERS, ADJUDGES and DECREES that the June 16, 1997, opinion and award of Barnett M. Goodstein, Arbitrator, in favor of defendant, International Union of Operating Engineers, Local 351, pertaining to the grievance of Elvin Gates be, and is hereby, vacated and set aside.

SIGNED January 12, 1998.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

IN THE MATTER OF ARBITRATION	§	FMCS #96-25250
BETWEEN	§	GRIEVANCE #461
OZARK-MAHONING COMPANY (NOW COOPER NATURAL RESOURCES)	§	GRIEVANT: ELVIN GATES
and	§	GRIEVANCE: SUSPENSION; LAST CHANCE LETTER; ASSESSMENT
INTERNATIONAL UNION OF OPERATION ENGINEERS, LOCAL 826 (NOW LOCAL 351-DUE TO MERGER)	§	DATE GRIEVANCE: 5/9/96

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HEARING HELD AT THE CRYSTAL PALACE INN, BROOKFIELD, TEXAS, ON JUNE 13, 1997, WITH MESSRS. CHRISTOPHER FREI (PRODUCTION MANAGER) AND DAVID SULIIN (CHIEF ENGINEER) REPRESENTING THE COMPANY; MR. ROGER HOLLAND, BUSINESS MANAGER OF LOCAL 351, REPRESENTING THE LOCAL UNION AND THE GRIEVANT, ELVIN GATES; BEFORE BARNETT M. GOODSTEIN, ARBITRATOR SELECTED THROUGH THE PROCEDURES OF THE FMCS, WASHINGTON, D.C.

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BACKGROUND

The Company has operated in Seagraves, Texas for many years; formerly, it was most recently operated under the name of Ozark-Manoning [sic] Company. However, it now is operated under the name, and management of, Cooper Natural Resources. The Company produces sodium-sulphate for use in the paper and glass industries among others.

The Company employees some 67 employees, approximately 45 of whom are in the bargaining unit. The bargaining unit is represented by the IUOE, and by Local 351 of that International, as a result of a recent merger of Locals 826 and 351. The Collective Bargaining Agreements have been for periods of three years. The one in effect at the time of the incident in question was in effect from May 16, 1993 to May 16, 1996.

Each employee is required to undergo an annual physical exam, which exam includes a drug screen. The Company has an Alcohol and Drug Policy, last amended in May, 1992. The Policy provides that, if an employee tests positive on the drug screen (in the case before us), the employee is "subject to discipline, including discharge, or other administrative action." Each year, prior to the beginning of the annual physicals, the employees are reminded that the physical includes a test for alcohol and drugs. They are told that, it they test positive for either, they are in serious trouble with the Company.

The Grievant, Mr. Elvin Gates, has been with the Company for some 15 years, and is a member of the bargaining unit. When Mr. Gates took his 1996 physical examination, including the drug screen, he tested positive for barbiturates.

Although the Grievant was amazed that the drug screen would show a positive result for him, since he swore to the Company that he was not on drugs, and that he had not taken, or used, any drug, legal (prescribed) or illegal (not available without prescription).

During the investigation, the Grievant informed his wife of his dilemma, and she remembered what might

have caused the problem. The Grievant works the graveyard shift, getting off work early in the morning. When he goes home to sleep, he does not wake up until about 2:00 p.m. prior to his next 11:00 p.m. shift. However, since he had been waking up with a severe headache, he had been taking a Tylenol (or like over the counter headache reliever) for this problem.

On the day of, or prior to, the Grievant's annual physical, he awakened with his usual headache. However, on that day, his wife gave him one of her prescription capsules, given her for her headaches, since they were stronger than the over-the-counter medicines. Apparently, the wife's prescription drug relieved the Grievant's headache. However, it caused him to test positive on the drug screen.

The Alcohol and Drug Policy requires the employee to advise the site medical representative or immediate supervisor "when taking a legal drug which may adversely affect his or her ability to work safely and productively." The Grievant did not inform either person of the fact that he had taken one of his wife's prescribed medicines for his headaches, since he did not realize he had done so.

However, the Company decided that, since the Grievant had tested positive for drugs on his drug screen, he should be terminated. Perhaps as a result of its discovery that the Grievant had used his wife's prescription – that made him test positive for barbiturates – or perhaps due to the intervention of the Union, the Company decided it would not terminate this 15-year veteran with the Company.

The Company then decided that it would suspend the Grievant for a period of two weeks, require him to sign a Last Chance Letter, and require him to go to an Assessment Center to be tested for addiction to drugs. The Letter required the Grievant to be randomly tested for "at least 12 months," and then to be subject to immediate discharge if ever testing positive in the future on any drug screen.

The Union and the Grievant felt this was too harsh a punishment for the Grievant's "involuntary" infraction, and filed a Grievance. The Grievance was filed with the Company on May 9, 1996. However, before the Grievance came before this arbitrator in arbitration, the Grievant had been randomly tested, approximately 7 times, during the 12-month period preceding the arbitration hearing, and had tested negative in all such tests. In addition, the Grievant had attended the Assessment Center, where he was tested for addiction to any drug. The result of the Assessment was that he was not addicted to any drug, and did not require any rehabilitation or treatment.

The Grievance alleges that the Grievant was treated differently than other employees who had tested positive for drugs and were not suspended, did not have to sign a Last Chance Letter, and were not required to undergo an Assessment, as was the Grievant.

The Grievance alleges that the Company violated the Contract or State or Federal law; that it had discriminated against the Grievant, and that it had committed unfair labor practices in the manner in which it had handled the Grievant's discipline.

The remedy sought was as follows: "My 2 weeks pay and the agreement torn up, plus mileage for going to Lubbock for an assessment." The Grievance was heard by the Company in the Grievance Steps under the Contract.

On May 17, 1996, the Company responded, at one of the Grievance Steps, as follows: "With regards to your positive drug screen results back in April 1996, the resultant events are consistent with the Elf Atochem North America, Inc. Alcohol and Drug Policy." The Grievance was denied during that Step. Ozark-Mahoning Company is a subsidiary of Atochem North America, Inc., and the Company then operated the Seagraves Plant as "elf atochem."

ON [sic] July 17, 1996, the Company wrote to the Grievant, advising him that, as a result of his positive test for drugs, his employment was subject to termination "under the Alcohol/Drug Policy or any other administrative action the company deem appropriate under the circumstances." However, the Company did not discharge the Grievant. Instead, it suspended him for 2 weeks, required that he sign the Last Chance Agreement, that permitted drug testing of the Grievant during the remainder of his term of employment. With that proviso, the letter concludes: "the Company considers this a closed matter and therefore deny the grievance. There has been no violation of the Labor Agreement."

The Union was not satisfied with the response from the Company, and appealed the Grievance to arbitration, where it was heard before this arbitrator on June 13, 1997.

ISSUE

DID THE COMPANY VIOLATE ARTICLE 23 – NO DISCRIMINATION – OF THE COLLECTIVE BARGAINING AGREEMENT, OR COMMIT AN UNFAIR LABOR PRACTICE, IN ITS DISCIPLINE OF THE GRIEVANT, MR. ELVIN GATES, FOR TESTING POSITIVE FOR A BARBITURATE DURING HIS DRUG SCREEN AT HIS ANNUAL PHYSICAL EXAMINATION? IF SO, WHAT SHALL BE THE APPROPRIATE REMEDY THEREFOR?

OPINION OF THE ARBITRATOR

The Union was represented by two Business Managers, both of whom have a considerable amount of experience in the handling of grievance matters in arbitration hearings.

The Company did not have a professional represent it during this arbitration hearing. Rather, the Production Manager and the Chief Engineer, together, handled the arbitration hearing on behalf of the Company. Neither had the experience in these mattes [sic] that could approach that of the Union representatives.

Therefore, in order to insure a fair hearing, the arbitrator felt compelled to instruct the Company representatives in their burden of proving, by a preponderance of the evidence (which was explained to them) that the Grievant had violated the Alcohol and Drug Policy of the Company, that was the reason given by the Company in the two letters given the Grievant as the reason for his discipline.

This arbitrator further explained to the Company representatives that they would have to prove that the Grievant knew, or should have known, of the Company's Alcohol and Drug Policy, and with such knowledge, then violated it.

Evidence during the hearing established that the Company does have an Alcohol and Drug Policy. The Company introduced a letter to "All Elf Atochem N.A. Employees," dated May 20, 1992. That letter provides that, in order to emphasize to the employees the importance of a drug free work place, it was giving "the widest possible circulation, we attach a copy of the updated policy."

However, in spite of the fact that the letter to the employees was dated May 20, 1992, and the Alcohol and Drug Policy introduced as a Joint Exhibit, is dated May, 1992, such Policy was not attached to the letter introduced to prove that the employees had received the Policy, and that all were aware of its contents. The Company did not, and could not, prove that the Grievant, or any other such employee of the Company, actually received, and knew of the Alcohol and Drug Policy introduced by the Company.

The Policy itself, introduced as a Joint Exhibit, provides that, "(T)he Corporate Human Resources Department shall develop information and communications to ensure that employees are informed about the dangers of drug abuse in the workplace, and other legally-required information, including the employment consequences of an employee's refusal or failure to comply with the

requirements of this Policy and the Drug-Free Workplace Act."

The Union contested that the Company ever had disseminated the information to the employees that is required of it in the Company's A&D Policy. The Union contested the Company's right to discipline any employee under the said A&D Policy, until and unless the said employee had knowledge of the Policy, and was shown to have understood its meaning, or at least, have had it explained to him/her.

The Company's two representatives at the arbitration hearing, were the Company's only witnesses. Perhaps, the reason for that is that the Company had no witness who could testify (by other than hearsay evidence) that the Grievant ever received a copy of the A&D Policy, ever had it read to him (in conjunction with others, if not alone). In fact, the Company was unable to prove that the Grievant knew any more about the A&D Policy than what appears in the Collective Bargaining Agreement as Article 29 ALCOHOL AND DRUG POLICY. That Article provides that the Company's said Policy "is incorporated herein as a part of this Agreement and shall apply in all respects to employees and applicants for employment.".

The Company argued that, because the said Policy is referred to in the Agreement, it was incumbent upon the employees to seek out and learn of the Policy, without having the Company explain it to them. However, the Company's own Policy makes it incumbent upon the Company that it "shall develop information and communications to ensure that employees are informed about the dangers of drug abuse in the workplace. . . . " Thus, it

appears to this arbitrator that it is the duty of the Company to insure that the employees know of the Policy and the dangers of using drugs and then working in the workplace. Even though this Policy is incorporated in the Agreement, the employees cannot be held liable for knowledge of its contents unless they have access to it, other than having to ask the Company for a copy.

The Company also testified that the said Policy had been posted on the Company Bulletin Board, for the employees to see and read. However, it could not testify as to when (specifically) it was so posted, and whether it was there long enough for the Grievant to see it. The Company had no proof that the Grievant ever was made cognizant of the contents of the said Policy.

The Company witnesses testified that there were Company-sponsored safety meetings, at least monthly, at which the requirement of a drug-free workplace was discussed. However, it was discussed by a member of management who was not present to testify. Moreover, we do not know whether the said Policy ever was discussed with the Grievant in any meeting, or ever read to the employees at such meetings.

The Grievant was called by the Company as a witness to respond to questions concerning his knowledge of the A&D Policy of the Company. He testified that he never had received a copy of the Policy in the mail from anyone; that he did not see the Policy if and when it was posted; and that he had no knowledge of the said Policy from anyone until after his drug screen.

The Company admitted that another employee had shown positive on a drug screen. However, after that

employee showed a copy of his prescription for the drug that caused the positive test, the Company forgave that employee completely. The Company differentiated that case from that of this Grievant, however, because this Grievant took someone else's prescription, rather than his own prescription.

That concerned the Company, since it could not then know whether this Grievant might be in the habit of using other people's prescription drugs, and thus be a menace to himself and others in the workplace. This arbitrator cannot accept this reasoning for anything that happened with and to this Grievant.

The Grievant testified that this was the only time he ever had taken his wife's prescription drug, and that this was without his knowledge. His wife, who was present at the hearing, concurred in this testimony. Moreover, both acknowledged that it never would happen again. In addition, the Grievant was given an Assessment by professionals, for the possibility of addiction, or a problem not known to, or recognized by, the Grievant. That assessment was negative, and the Grievant was informed that he needed no rehabilitation because he had no such addiction.

Given all the evidence before this arbitrator, it is obvious that the Company failed to prove, by a preponderance of the evidence, that the Grievant ever knew, or should have known, of the Company's A&D Policy, under the circumstances. Since his discipline was based upon the Company's A&D Policy, it was incumbent upon the Company to prove that the Grievant had received a copy of the A&D Policy of which he was accused of

having violated, or at least to prove that the Grievant knew of the contents of that Policy and, with such knowledge, then violated its provisions. It did neither.

The Company failed to prove, by a preponderance of the evidence, that the Grievant knew of the Company's A&D Policy and, with such knowledge, then violated that Policy, even accidentally.

AWARD OF THE ARBITRATOR

DID THE COMPANY VIOLATE ARTICLE 23 – NO DISCRIMINATION – OF THE COLLECTIVE BARGAINING AGREEMENT, OR COMMIT AN UNFAIR LABOR PRACTICE, IN ITS DISCIPLINE OF THE GRIEVANT, MR. ELVIN GATES, FOR TESTING POSITIVE FOR A BARBITURATE DURING HIS DRUG SCREEN AT HIS ANNUAL PHYSICAL EXAM? IF SO, WHAT SHALL BE THE APPROPRIATE REMEDY THEREFOR? is answered in the affirmative as to a violation of the Agreement.

The Company did discriminate against the Grievant by its suspension of the Grievant, requirement of the Last Chance Letter, and requirement of an Assessment, as a result of his having tested positive for a barbiturate during his drug screen. When the Company learned of the reason for the positive test, and when the Grievant had passed his Assessment requirement, and the conclusion that no rehabilitation was necessary, the Company no longer had just cause for any discipline of the Grievant.

Therefore, it is the Award of this arbitrator that the Grievance be, and it is hereby, sustained in all things; that

the suspension be set aside and removed from the Grievant's record, with pay for all such period [sic] of suspension; that the Last Chance Agreement be removed from the Grievant's record and personnel file; and that the Grievant be paid for the mileage from his workplace to Lubbock for purposes of his Assessment as a result of the drug-testing incident. In sum, that the Grievant be made whole in all ways, as a result of the Company's having violated the Grievant's rights under the Collective Bargaining Agreement.

/s/ Barnett M. Goodstein
Barnett M. Goodstein
Arbitrator

4230 LBJ Freeway, Suite 121
Dallas, Texas 75244
(972) 387-4303

June 16, 1997

R.E. Gates
P.O. Box 835
Loop, Texas 79432

Gentlemen:

This letter confirms the agreement among Elf Atochem North America, Inc., R.E. Gates, and International Union of Operating Engineers respecting the employment status of R.E. Gates.

BACKGROUND

On April 9, 1996, R.E. Gates tested positive for Barbiturates in a test administered by Professional Health Services Inc. during this year's annual physical. As a consequence, R.E. Gates is subject to discharge and R.E. Gates has been advised of the Company's intent to terminate his employment. R.E. Gates has acknowledged to representatives of Elf Atochem and the Union that he had taken medication prescribed for his wife. A clinical assessment of R.E. Gates revealed no appearance of addiction, therefore rehabilitation is not warranted. However Elf Atochem has concluded that for testing positive, under the company's Alcohol and Drug policy that R.E. Gates shall be suspended without pay for the time lost prior to reinstatement of his employment and subject to the conditions set forth below.

AGREEMENT

Subject to the conditions set forth below, Elf Atochem agrees to:

(1) Continue R.E. Gates employment with the Company and his participation in the Company's employee benefit plans.

In consideration thereof, R.E. Gates agrees that he will:

(1) Upon reinstatement to active employment, and for so long as he is employed by Elf Atochem, abstain from using drugs in any amount whatsoever that do not comply with all Elf Atochem rules relating to alcohol and drugs.

(2) At the request of Elf Atochem, submit to such physical examinations and/or testing as Elf Atochem, in its sole discretion, deems necessary to ascertain his compliance with the terms of this Agreement for a period of no less than 12 months.

R.E. Gates understands and agrees that his continued employment is contingent upon his meeting satisfactorily all of the above conditions of employment, and that his failure to do so subjects him to immediate termination of his employment with Elf Atochem.

This Agreement is applicable only to R.E. Gates. The Union and Elf Atochem agree that this Agreement shall not establish a precedent as to any other employee. This Agreement may be used in any proceeding which results from discipline or discharge administered by Elf Atochem to R.E. Gates, but it shall not be used by either Elf Atochem or the Union in any arbitration proceeding

involving the discipline or discharge of any other employee.

/s/ Illegible Elf Atochem North America, Inc.	4-26-96 Date
/s/ Tomas Garza International Union of Operating Engineers	4-26-96 Date
/s/ R.E. Gates R.E. Gates	4-Illegible Date

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-10273

COOPER NATURAL RESOURCES INC

Plaintiff – Appellee

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 351

Defendant – Appellant

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

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ON PETITION FOR REHEARING

(Filed Feb. 9, 1999)

Before KING, Chief Judge, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED

ENTERED FOR THE COURT:

/s/ Carl E. Stewart
United States Circuit Judge

Supreme Court, U.S.
FILED
JUN 7 1999
CLERK

No. 98-1794

IN THE

Supreme Court of the United States

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 351,

Petitioner,

v.

COOPER NATURAL RESOURCES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERQUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit properly held that an arbitrator fundamentally erred when he utterly ignored a bargained for compromise agreement between the employer and the grievant's union that settled the underlying grievance.

2. Whether the Fifth Circuit properly held (as an alternate ground for its decision) that an arbitrator fundamentally erred when he determined a grievant had no notice of his employer's drug policy, even though that policy constituted an unambiguous and express CBA provision.

STATEMENT PURSUANT TO RULE 29.6

The petition accurately lists the parties to the proceeding.

Respondent, Cooper Natural Resources, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

The International Union of Operating Engineers ("Union") requests this Court to review a Fifth Circuit decision that plows no new ground. Rather, that decision applied settled law to vacate a profoundly flawed arbitration decision. (That decision had revoked minor discipline imposed on an employee after he had tested positive for barbiturates). In fact, the Fifth Circuit correctly vacated that flawed decision on two independent grounds. Each ground rested on the unremarkable conclusion that the arbitrator in effect invalidated a bargained for contract term. Consequently, Union's questions warrant no further review.

COUNTERSTATEMENT OF THE CASE

A. The Parties Bargained Over The Drug Policy And Agreed To Include It In The CBA.

Respondent Cooper Natural Resources, Inc. ("Cooper") produces sodium sulfate at its facility in Seagraves, Texas. (R. 204; App. 2). Safety is a major concern at that facility. (*Id.*).

Over the years, Cooper and Union have bargained for a number of safety-related terms and conditions of employment. In 1989, they bargained for an especially critical safety measure — an alcohol and drug policy (hereinafter the "Drug Policy"). (R. 204; App. 3). That Drug Policy was not a mere work rule, however. Rather, it became an explicit part of the parties' collective bargaining agreement ("CBA"). Since about 1989, therefore, Cooper has regularly drug-tested its employees, including bargaining unit members. (R. 205; App. 16).

In bargaining for subsequent CBAs, the parties agreed to maintain the Drug Policy in the CBA. (R. 205; App. 3). For example, the parties' May 1993 CBA included the Drug Policy. (R. 205, R. 231; App. 2-3).

The May 1993 CBA in fact contained several provisions related to the Drug Policy. First, Article 29 of the CBA provided that Cooper's "Drug Policy modified May 1992 is incorporated herein as a part of this Agreement and shall apply in all respects to employees and applicants for employment." (R. 231). In turn, the Drug Policy expressly provided for drug testing of employees in conjunction with a routine physical examination. (R. 242 and R.E. Tab 7; App. 3). The Drug Policy also provided that employees who tested positive would be subject to discipline, including discharge. (R. 243 and R. 245; App. 3).

Besides expressly incorporating the Drug Policy, the 1993 CBA also contained further provisions regarding Cooper's right to conduct drug tests and to discipline employees based on those tests. Thus, Article 29 of the CBA separately added that Cooper could require employees to take a drug screen. (R. 231; App. 16). Further, Article 28 provided that "if a physical examination, including a drug screen test, should disclose that an employee's condition may be detrimental to the employee or others in the plant, [Cooper] reserves the right to make such adjustments in the employee's status as are found necessary to correct the situation." (R. 230; App. 3).

Accordingly, the CBA provided two sources for Cooper's explicit right to do two things: conduct drug tests and then to issue discipline based on that testing. The Drug Policy itself gave Cooper those express rights and that Drug

Policy was expressly incorporated in the CBA. Second, Articles 28 and 29 of the CBA separately provided for the same rights. In neither the CBA nor Drug Policy were the bargained for rights conditioned in any way.[1]

Union submitted the May 1993 CBA to its members for ratification. (R. 9, R. 64, and R. 205; App. 16). The Union members ratified the CBA (R. 9, R. 64, and R. 205; App. 16).

B. Gates Admittedly Took Barbiturates That Were Not Prescribed for Him.

One of the Union members at the time of ratification was Elvin Gates ("Gates"). Gates occupied the job of chiller operator at the Cooper plant. (R. 205; App. 3). That job encompassed the operation of a mechanical refrigeration system charged with anhydrous ammonia, a hazardous substance. (R. 205; App. 3).

On April 9, 1996, Gates submitted to an annual physical. (R. 205; App. 17). Pursuant to past practice, the 1993 CBA, and the Drug Policy, his physical included a drug screen. (R. 205; App. 17). Prior to the drug screen, Gates signed a consent form authorizing collection of a urine specimen for purposes of the drug screen. (R. 206 and R. 248; App. 3).

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1. In its Petition to this Court, Union dwells at length on a minor provision of the Drug Policy that required Cooper to "develop information and communications" about the Drug Policy. (Pet. Brief at p. 5). This provision in no fashion attempted to condition Cooper's contractual right to drug test employees or to discharge employees who tested positive.

As a result of Gates' drug screen, Cooper learned that Gates had tested positive for barbiturates, a controlled substance. (R. 206; App. 17). Cooper investigated. Although Gates initially denied taking any form of barbiturates or any prescribed medications, he later changed his story. He subsequently related to Cooper that he supposedly had taken some of his wife's medications. (R. 206; App. 17). Cooper concluded Gates had seriously breached the Drug Policy and so initially decided to discharge him. (R. 206; App. 4).

C. The Union Intervened, Struck a Compromise Bargain with Cooper, and Signed a Written Agreement Memorializing the Compromise.

After Cooper decided to discharge Gates, the Union intervened on his behalf. (R. 206; App. 4). As a result of the intervention, Cooper, Union, and Gates all agreed through bargaining to modify the quantum of Gates' discipline. (R. 206; App. 4).[2] Instead of discharge, the parties agreed to several matters that were all memorialized in a written agreement (colloquially known as and hereinafter referred to as the "Last Chance Agreement" or "LCA"). Cooper, Union, and Gates signed the Last Chance Agreement on April 26, 1996. (App. 37-39). Under the LCA, (1) Gates was reinstated but he lost the pay for the time he missed from work after his drug test and before the LCA

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2. In its brief to this Court, Union has egregiously mischaracterized the record regarding this issue. Union maintains in several places that Cooper told Gates "sign the Last Chance Agreement or be fired." (Pet. Brief at pp. 3, 12, and 15). This unequivocally is a gross mischaracterization because (1) the arbitrator did not so find or hold; (2) based on the record that issue was not even addressed at the arbitration; and (3) no other summary judgment evidence even alludes to this possibility.

was signed; (2) Gates warranted that he would abstain from any drugs prohibited by the Drug Policy; and (3) Gates agreed to submit to regular and random drug testing for a period of no less than 12 months. (*Id.*)

In accordance with the LCA, Cooper rescinded Gates' termination and returned him to work. (R. 206; App. 18). However, after having reached a bargain with Cooper, Union turned around on May 9, 1996, and grieved the very issue the parties settled in the LCA. (R. 207; App. 4 - 5). In its grievance, Union requested that the LCA, which it had just signed, be "torn up" and that Gates recover his pay for the period he did not work after the drug test. (R. 207; App. 18). Cooper denied the grievance citing its rights under the Drug Policy, the CBA, and the LCA. (R. 253). The parties then submitted the grievance to arbitration pursuant to the CBA. (R. 223; App. 5).

D. The Manifestly Flawed Arbitration Decision

Under the CBA, the parties had agreed that the arbitrator's sole function was to determine whether Cooper or Union was correct with reference to the proper application and interpretation of the CBA. (R. 228; App. 5). The CBA expressly decreed that the arbitrator had no authority to change, amend, modify, or supplement the CBA in any respect. (R. 228; App. 5).

However, the arbitrator who heard Union's grievance entirely abrogated not one but two of the parties' collectively bargained terms. The arbitration was conducted on June 13, 1997, by arbitrator Barnett M. Goodstein. (R. 207). At the proceeding's inception, the parties submitted joint exhibits to the arbitrator. Those exhibits included the 1993 CBA, the Drug Policy, and the LCA. (R. 207).

During opening statements, a Union business agent conceded that Gates took barbiturates that were not prescribed to him and that he therefore tested positive on a drug screen. (R. 207; App. 5). The business agent and Union did not contend that under these facts, the Drug Policy did not apply. Nor did Union attack the validity of the LCA. Rather, Union solely contended that Gates supposedly lacked notice of the Drug Policy and so therefore could not be expected to adhere to it. (R. 207; App. 5). Union contended this even though Union had negotiated the Drug Policy into the CBA and even though Union members had ratified the CBA. (R. 9, R. 64, and R. 205; App. 3).

Cooper then tried to put on its case-in-chief. Before it was permitted to do so, the arbitrator expressly told Cooper's representatives that Cooper had to prove that Gates "knew or should have known of [Cooper's] drug policy. . . ." (App. 31). Consequently, Cooper introduced two memos that demonstrated that in 1989 and 1992, all employees were given a copy of the Drug Policy. (R. 207, R. 255, and R. 257; App. 18). At the end of Cooper's case-in-chief, the arbitrator informed Union it did not need to put on its case-in-chief because, according to the arbitrator, Cooper had failed to show that Gates had notice of the Drug Policy. (R. 208; App. 34).

Three days after the hearing, the arbitrator issued his written opinion. (App. 25 *et seq.*). In that opinion, the arbitrator determined the following facts:

- Cooper had its Drug Policy in effect for many years (App. 26);

- That Drug Policy provided that if an employee tested positive on a drug screen, the employee would be subject to discipline, including discharge (App. 26);

- The Drug Policy was expressly incorporated by reference into the CBA (App. 32);

- The Drug Policy had been posted on the plant's bulletin board (App. 33);

- Each year before annual physicals, employees were warned that the physicals included drug screens and that if they tested positive "they are in serious trouble with Cooper." (App. 26);

- In safety meetings, the requirements of a drug free workplace have been discussed (App. 33);

- In May 1992, Cooper disseminated a memo to employees expressing the importance of a drug free workplace and which included a copy of the Drug Policy (however, the arbitrator declined to give much weight to this evidence because at the hearing Cooper had failed to physically attach the Drug Policy — which was a joint exhibit — to the May 1992 memo) (App. 31); and

- Gates tested positive for barbiturates in 1996 (App. 26).

After finding these facts, the arbitrator's opinion dwelled entirely on the issue of whether Gates did or did not have notice of the Drug Policy. (App. 30-35). Nowhere

in his opinion did the arbitrator discuss the validity or even relevance of the LCA. Nowhere in his opinion did the arbitrator discuss or even refer to the binding nature of the drug testing provisions of the CBA. As seen below, these were fundamental and fatal flaws. The arbitrator did not merely misinterpret a contract provision but in effect abrogated two entire contractual provisions.

E. The District and Appellate Court Both Properly Found that the Arbitrator had Committed Fundamental Error.

Cooper appealed the arbitrator's patently flawed decision. The District Court held that the arbitrator violated his duty to apply the CBA and separately, his duty to apply the LCA. (App. 13-21). The Fifth Circuit affirmed on both these independent grounds. (App. 1-12).

REASONS FOR DENYING THE WRIT

The Fifth Circuit's opinion does not conflict with any decision of this Court or any other court of appeals.[3] Indeed, the Fifth Circuit's decision rested on two separate and independent grounds both of which correctly applied settled law. Review by this Court is therefore unnecessary.

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3. Union does not even contend in its brief that the Fifth Circuit's opinion conflicts with any decision of any other court of appeals.

I.

IN HOLDING THAT THE ARBITRATOR IMPERMISSIBLY IGNORED THE LAST CHANCE AGREEMENT, THE FIFTH CIRCUIT JOINED ALL OTHER CIRCUITS TO HAVE CONSIDERED THE MATTER.

In one of its grounds affirming summary judgment, the Fifth Circuit held that the arbitrator improperly failed to apply the LCA. (App. 8-12). In so holding, the Fifth Circuit joined every other court of appeals to have considered the issue.

The Fifth Circuit's holding rests on a fundamental and settled doctrine: last chance agreements entered into between employers and unions are binding as much or even more than CBAs. Because they are binding as labor contracts, an arbitrator owes as much or even more deference to LCAs as he does to CBAs. As the Fifth Circuit recognized, the arbitrator here completely lost sight of this profound rule.

This rule has been applied in several circuits, including the Sixth Circuit. *See Bakers Union Factory No. 326 v. ITT Continental Baking Co., Inc.*, 749 F.2d 350 (6th Cir. 1984). That case fully explored the principles animating the court's holding that last chance agreements cannot be disregarded by arbitrators. The court began its analysis by citing the oft-cited labor law principle favoring the finality of arbitration decisions. *Id.* at 353. The court, however, looked beyond this simple phrase and noted that:

> It is not arbitration per se that fundamental policy favors, but rather final adjudication of differences by a means selected by the parties. If the parties agree that a procedure other than arbitration shall provide a conclusive resolution of their differences, fundamental labor policy encourages that procedure no less than arbitration.

Id. citing *United Mine Workers v. Barnes & Tucker Co.*, 561 F.2d 1093, 1096 (3rd Cir. 1977).

The Sixth Circuit then determined that grievance settlement agreements reflect just such an alternative means of resolving grievances. *Id.* at 354-55. Because this is so, the parties to such agreements "have not bargained for an arbitrator's construction of the collective bargaining agreement: they have bargained for their own construction." *Id.* at 354. Accordingly, arbitrators must enforce such agreements as the parties' chosen means of settling their disputes. *Id.* at 354-55.

As noted by the Fifth Circuit, all other circuits to have considered this matter have followed the Sixth Circuit's lead. *See, e.g., Tootsie Roll Indus., Inc. v. Local Union No. 1*, 832 F.2d 82, 82 (7th Cir. 1987); *Coca-Cola Bottling Co. of St. Louis v. Teamsters Local No. 688*, 959 F.2d 1438, 1439 (8th Cir.), *cert. denied,* 506 U.S. 1013 (1992).

In its Petition to this Court, Union not surprisingly declined to mount a direct attack on this settled law. Rather, Union relies both on a mischaracterization of the record and a vain attempt to distinguish the case law. Thus, Union contends (without any record support) that "Gates was

required to sign and LCA as a condition of continued employment and he asked the arbitrator to determine whether Cooper was justified in requiring him to do so." (Pet. Brief at p. 12).

Presumably, Union means that the LCA was extracted only through duress and coercion. However, the arbitrator never considered such an issue; nor was it argued to him at any point by Union. Nor is there any summary judgment evidence in any form indicating that the LCA resulted from duress or coercion. Consequently, Union's contention is contrived and misleading.

In a confusing argument, Union also appears to argue that an arbitrator has the authority to determine whether a last chance agreement is binding. (Pet. Brief at pp. 13-14). If Union is contending that an arbitrator can determine the factual issue of whether a last chance agreement was reached through duress or coercion, Union's contention is unremarkable. However, as seen above, the arbitrator did not find or even address this issue. Nor is there any evidence to suggest it. Accordingly, Union's contention again misses the mark.

The same can be said for Union's further contention that the Fifth Circuit's holding somehow condoned an implied "waiver of the right to appeal." (Pet. Brief at pp. 14-16). Presumably, Union is contending that because LCAs are binding on the parties and the arbitrator, LCAs foreclose the underlying grievance from meaningful review by the arbitrator. If this is Union's argument, it demonstratively fails. First, neither the Fifth Circuit nor any other circuit has held or inferred that last chance agreements operate as a "waiver of the right to appeal." Second, this

scenario in no fashion entails a forfeiture of Union's right to arbitrate whether the LCA was reached through duress or coercion, or to arbitrate any ambiguous terms of the LCA, or to arbitrate whether the parties correctly carried out the terms of the LCA. However, in the absence of these issues, an arbitrator cannot overturn the parties' chosen means of resolving their dispute.

In essence, Union is contending it was proper for the arbitrator to *sub silentio* strike the LCA because it did not accord with his view of industrial justice. Union invites this Court to approve this machination. However, this is exactly what this Court has said violates an arbitrator's fundamental duty. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 591, 597 (1960) (an arbitrator "does not sit to dispense his own brand of industrial justice").

Union's arguments and not the Fifth Circuit's opinion are therefore contrary to this Court's precedents. For this reason alone, the Fifth Circuit's opinion does not warrant review by this Court.

II.

IN HOLDING THAT THE ARBITRATOR INCONGRUENTLY FOUND THAT GATES LACKED NOTICE OF THE DRUG POLICY, A CBA TERM, THE FIFTH CIRCUIT CORRECTLY APPLIED SETTLED LAW.

In another ground affirming summary judgment for Cooper, the Fifth Circuit held that the arbitrator committed fundamental error by finding that Gates lacked notice of a CBA term that Union negotiated and Union members

ratified. (App. 7). The Fifth Circuit correctly applied settled law to reach this conclusion. Union's attempts to argue to the contrary are unavailing.

As the Fifth Circuit properly recognized, the arbitrator's opinion contains a fatal internal contradiction. On the one hand, the arbitrator's entire opinion rested solely on one ground — that Gates supposedly lacked notice of the Drug Policy. (App. 31-35). However, relying on that ground caused the arbitrator to disregard and abrogate the very CBA he was duty bound to interpret. That is, the Drug Policy was indisputably part of the CBA. It did not exist separate and apart from it. It was not a mere work rule.[4]

As part of the CBA, the Drug Policy consequently constituted a term of employment collectively bargained by Cooper and Union. When Union agreed to the Drug Policy, it necessarily bound all bargaining unit employees to its terms. *See Cary v. Teamsters Local 95*, 150 L.R.R.M. (BNA) 3018, 3021 (E.D. Va. 1993), *affirmed*, 23 F.3d 400 (4th Cir. 1994) (drug testing provisions of a bargaining agreement were binding on all members of the bargaining unit including union non-members). Accordingly, once Union agreed to the Drug Policy as a CBA term, it automatically made that policy binding on all the bargaining unit employees whether they knew of the policy or not.

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4. Indeed, even though the Drug Policy was incorporated by reference into the CBA, the CBA also independently contained other explicit references to Cooper's right to drug test (Art. 29 of the CBA) and its right to discipline based on the drug test results (Art. 28 of the CBA). In fact, this latter provision expressly allowed Cooper in its discretion to make any "adjustments in the employee's status" if a drug test disclosed an employee's condition could have been detrimental to the employee or others. (R. 230; App. 3).

Thus, the arbitrator's critical mistake was importing a lack of notice theory — which can be relevant to the question whether an employer had just cause to discipline for violating *non-CBA* work rules — into the context of a violation of an explicit CBA term. Because CBA terms are automatically binding on employees, an employee's specific knowledge of the CBA terms is irrelevant. In other words, just cause analysis is wholly inapposite in this context.

This principle has been applied in an analogous context. For example, it is well settled that if a CBA explicitly describes a disciplinary penalty for specific conduct, an arbitrator cannot substitute his own penalty once he finds the employee committed the specific conduct. *See, e.g.*, *Bruce Hardwood Floors v. UBC, Southern Council of Industrial Workers, Local No. 2713*, 103 F.3d 449, 452 (5th Cir.), *cert. denied*, 118 S. Ct. 329 (1997) ("once the arbitrator found that [the employee] fabricated her story, he was bound to impose the penalty provided by the CBA for that conduct"); *S.D. Warren Co. v. United Paper Workers' Int'l*, 845 F.2d 3, 8 (1st Cir.), *cert. denied*, 488 U.S. 992 (1988) (because the employer and union had negotiated and incorporated into the collective bargaining agreement disciplinary rules and penalties for violation of those rules, "[n]othing is left to the arbitrator's judgment except determining whether the rules are violated"). These cases therefore stand for the proposition that an arbitrator cannot seize on a just cause analysis as "the loophole through which the arbitrator bypasses" mandatory contract language. *Mountaineer Gas Co. v. Oil, Chemical & Atomic Workers Int'l Union, Local 3-372*, 76 F.3d 606, 610 (4th Cir.), *cert. denied*, 117 S. Ct. 80 (1996).

In this case, the arbitrator similarly contrived to find a "loophole." By grasping at the "no notice" theory, he effectively read the Drug Policy completely out of the parties' CBA. The Fifth Circuit properly concluded this was fundamental error.

In its brief to this Court, Union has attempted to obscure this simple holding. The thrust of Union's argument is that the Fifth Circuit overturned the arbitrator's factual findings. (Pet. Brief at pp. 8-11 and 17-21). Union goes so far as to argue that certain alleged comments by the court about the arbitrator's factual findings "infect[ed] every aspect of the Court's reasoning." (Pet. Brief at p. 9). This contention is a gross mischaracterization. In fact, after proffering this sweeping claim, Union supports this contention by citing to peripheral comments by the Fifth Circuit buried in two footnotes. (Pet. Brief at pp. 9-10). However, these isolated comments cannot obscure the Fifth Circuit's clear holding that the arbitrator impermissibly used a "loophole" to abrogate a clear CBA term. Consequently, Union's contention that the Fifth Circuit's opinion is "infected" with improper comments on fact finding is a canard.

In its remaining argument to this Court, Union contends that an obscure provision of the Drug Policy may have created a "condition precedent" to enforcement of the Drug Policy and that the arbitrator supposedly so found. (Pet. Brief at pp. 19-20). This contention again is a diversion.

Union (as the arbitrator) is still confusing apples and oranges. The CBA contained *two* sources[5] for Cooper's right

5. As seen above, these two sources are : (1) the Drug Policy, which was incorporated by reference into the CBA; and (2) Articles 28 and 29 of the CBA.

to do *two* things: drug test and then discipline for positive drug test results. Here, Cooper drug tested Gates and then disciplined him for testing positive. The CBA in two ways gave Cooper the unambiguous contractual right to do so. That the Drug Policy (one of the two sources of that right) contained one minor provision that Cooper should inform its employees about the Drug Policy cannot and does not create a "condition precedent" in any sense. Consequently, if the arbitrator in fact relied upon this reasoning[6], his grave error still stands. An arbitrator simply cannot "interpret" entire unambiguous CBA terms completely out of the CBA. Because this is exactly what the arbitrator did here, as the Fifth Circuit properly held, the Court need not review that court's opinion.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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6. It is wholly unclear from his opinion whether the arbitrator in fact ever relied on this reasoning. The arbitrator's opinion certainly does not mention anything about a "condition precedent." Rather, his opinion follows the usual just cause "no notice" reasoning that, as seen above, led the arbitrator profoundly astray.